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No. 87-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Appellant,

v.

DIRECTOR OF REVENUE OF MISSOURI,
Appellee.

On Appeal From The Supreme Court of Missouri

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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ARGUMENT

Appellee's Motion to Dismiss or Affirm ("Motion") rests upon Appellee's premise that imposition of the St. Louis County sales and transportation sales taxes in question is not unconstitutional because Shell's aviation fuel sales are *intra*state. As a factual proposition that argument is plainly wrong. Furthermore, Appellee's argument tacitly concedes that Shell's transactions involve *inter*state commerce. The Motion is without foundation, and it should be overruled.

A. The Sales Are Interstate.

(1)

Appellee argues that the "facts actually show that the transactions in question are *intrastate* in character"

because "the sales in question are entirely consummated in St. Louis County" and, consequently, that "[n]o interstate commerce or interstate transportation is involved." Motion, at 4, 5. He points to a number of factors that he claims render Shell's sales purely intrastate. *Id.* Many of those enumerated factors clearly misstate the facts.[1] None of those factors, however, makes the sales in question any less interstate in character. Neither Appellee nor the Supreme Court of Missouri can turn interstate sales

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[1] Appellee's recitation of the facts errs in at least the following respects: (1) As noted below, Appellee insists that Shell's contracts with the airlines are "contracts for future sales and no delivery of the fuel takes place pursuant to these contracts." Motion, at 5. Yet nothing more is required before the employees of Allied, the airlines' agent, are permitted to request delivery of the fuel; the contracts, quite clearly, are the basis for the delivery. (2) Nothing in the stipulation of facts supports the statement that Shell's exchange agreement with Amoco contemplates "a transaction to occur at" the Airport. *Id.* The agreement in fact contemplates only delivery of the fuel to Allied, the airlines' agent, in conjunction with Shell's interstate transaction. (3) Furthermore, nothing in the stipulation states that the exchange agreement "allow[s] Shell to use Amoco's meter." *Id.* Shell merely uses Amoco fuel. Allied's employees "read" the meter and send tickets to Shell and the airlines. (4) Shell's sales are to airlines serving the Airport, but they are not sales "at the . . . Airport." *Id.*, at 2. (5) Appellee also refers twice to the Airport meter as the "site" of the sales, *id.*, at 5, but it is clear that the meter simply measures the fuel again at the place of *delivery*. (6) Appellee's statement that title to the fuel passes from Amoco to Shell when the fuel passes through Amoco's Airport fuel meter but that "[s]ubsequently appellant transfers title to the fuel to each airline," *id.*, is misleading insofar as it implies that there is a disruption in the flow of the fuel from the Amoco refinery in Wood River, Illinois, to Allied's storage facilities in St. Louis County, Missouri. (7) Finally, as noted below, Appellee's statement that "[n]o interstate commerce or interstate transportation is involved in the sale," *id.*, at best ignores the interstate incidents of the sales and at worst misrepresents the fact that the fuel is transported from Illinois to Missouri.

into intrastate sales simply by ignoring those portions of the transactions occurring outside of Missouri.

First, Shell's aviation fuel contracts with the various airlines are made outside of Missouri. They are accepted and executed by Shell at its office in Houston, Texas. While Appellee argues that those contracts "are contracts for future sales and no delivery of the fuel takes place pursuant to these contracts," Motion, at 5, it is clear that nothing more is involved—employees of Allied, the *airlines'* agent, simply request delivery of the fuel pursuant to those contracts whenever it is needed.

Second, the fuel moves in interstate transportation, and thus in interstate commerce. It comes from Amoco Oil Company's refinery in Wood River, Illinois, through an interstate pipeline, is measured in transit by Amoco Oil Company's fuel meter at the Airport (which employees of Allied, not Shell, operate), and is delivered into Allied's storage facilities in St. Louis County, Missouri. Appellee's argument that "[n]o interstate commerce or interstate transportation is involved," Motion, at 5, is absurd. As with natural gas, aviation fuel "crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland* v. *Louisiana*, 451 U.S. 725, 755 (1981). *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 169 (1954).[2] How, then, can Appellee main-

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[2] In *Calvert*, Texas attempted to tax the pipeline company on the basis of the delivery of, and passage of title to, natural gas in the pipeline as it came from the seller's refinery and into the company's connecting pipeline. The Court held that such a tax was an impermissible burden on interstate commerce. *Id.* at 170. It rejected the State appellate court's argument that the passage of title between the "taking" of the gas, which the statute made the taxable event, and transmission of the gas in interstate commerce was sufficient to

tain that the passage of title from Amoco to Shell at the instant the fuel passes through the Amoco Oil Company meter at the Airport removes the fuel from interstate commerce prior to the fuel reaching the "ultimate consumer"?

Third, Shell bills the airlines for the fuel from its administrative center in Oak Brook, Illinois. Clearly billing and payment are an integral part of the sale transaction. The Supreme Court of Missouri has clearly stated that for purposes of local sales taxes, sales are not consummated until payment is made. In *Mobil-Teria Catering Co.* v. *Spradling*, 576 S.W.2d 282, 284 (Mo. 1978) (en banc), which addressed a tax indentical to the taxes at issue here, that court said that the "sales are . . . consummated" by payment for the goods.[3]

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separate the "taking" from the interstate portion of the transaction. The Court explained:

> "As for the interference of title passing, . . . we think that, as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another. Such an aspect of interstate transportation cannot be 'carve[d] out from what is an entire or integral economic process'. . . . The separation must be realistic." *Id.*, at 169.

See also Illinois Natural Gas Co. v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 503-04 (1942).

[3] *See* Mo. Rev. Stat. § 400.2-106(1) (1986) (under Uniform Commercial Code, a "sale" "consists in the passing of title from the seller to the buyer *for a price*" (emphasis added)). *Cf. State ex rel. Smith* v. *City of Springfield*, 375 S.W.2d 84, 87 (Mo. 1964) (en banc) ("the sale and purchase was consummated by transfer of the properties . . . and the payment of the purchase price"); *Bertram* v. *Kempster*, 216 S.W.2d 494, 495 (Mo. 1949) (sale of real property "was consummated by defendants' execution of a deed to plaintiffs and by plaintiffs' payment").

Appellee's argument mirrors the opinion of the Supreme Court of Missouri below, and it suffers from the same fatal flaw: The transparent attempt to justify taxation of Shell deliberately ignores the interstate elements of the sales. Appellee refers more than once to Shell's "version of the facts," Motion, at 4, but it is Appellee's "version of the facts" that is entirely misleading.[4] The sales are *not* intrastate. Appellee's argument to the contrary is wrong.

(2)

The Supreme Court of Missouri held that Shell's constitutional challenge "evaporate[d]" because that court "found the sale [sic] to be intrastate in character." App. to Juris. Statement, at 7a. This Court is not, however, required to accept that finding blindly. This Court has clearly said that it

> "is . . . not bound by the state court's determination that the challenged tax is not a tax on interstate commerce. 'The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the

[4] Appellee also states that Shell is attempting to "shade its local activities by cunning agreements with other oil companies, airlines, and storage facilities." Motion, at 6. That accusation implies some sort of impropriety that has never been suggested heretofore. It is curious why Appellee finds it necessary to resort to the allegation of "shad[y]," "cunning" activities if, as Appellee contends, the sales were truly intrastate. Shell takes strong exception to this unfounded accusation. The contracts with the airlines are the foundation of the seller-purchaser relationship. Shell's exchange agreement with Amoco Oil Company is a type commonly used in the petroleum industry, and it is perfectly legitimate. Finally, Shell is not a party to the agreements for use of Allied's storage facilities, which are purely between Allied and the airlines.

> highest court of the State, is or is not "a tax on interstate commerce."'" *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 107-08 (1975) (quoting *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389, 393 (1952)).

See Calvert, 347 U.S., at 165 (Court accepted State court's determination of operating incidence of tax, but disagreed with its conclusion of constitutionality).[5] Were it otherwise, State courts could pretermit this Court's review by a finding, whether supported by evidence or not, that interstate commerce was not involved. Appellee would have this Court abdicate its constitutional function by accepting outright the conclusion of the court below, which is clearly contrary to fact and is aimed solely at upholding local taxation.[6] This Court must refuse to do

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[5] *See also In re Primus*, 436 U.S. 412, 434 (1978), in which the Court noted that

> "'considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment [against appellant]. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied.'" *Id.* (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-85 (1964)).

[6] Appellee points out that the parties stipulated that Shell had paid over to the State, and no controversy existed with respect to, sales or use taxes due the State itself. Motion, at 3. Shell has always contended that it paid over State use taxes, *see* Juris. Statement, at 8, while Appellee has always contended that Shell paid State sales taxes; but, since the amounts of those taxes were the same, and since in either event Shell was able to collect the funds from its customers, there was no dispute between Shell and the State. But while Missouri has authorized St. Louis County to impose and collect *local sales* taxes, it has not authorized imposition of *local compensating use* taxes. The Supreme Court of Missouri failed to recognize this important distinction. In determining whether imposition of the local sales

so. The attempted imposition of St. Louis County sales and transportation sales taxes against Shell in contravention of the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment presents a substantial federal question that this Court should address. Appellee's Motion should be overruled.

B. Appellee's Argument Tacitly Concedes That Shell's Sales Are In Interstate Commerce.

Appellee's contention that Shell's sales are purely intrastate in character undermines itself by tacitly conceding that the sales are, in fact, interstate. Citing *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), Appellee intones the general principles he finds in those cases that "State taxation on the 'privilege of doing business' is not per se unconstitutional when applied to interstate commerce" and that interstate commerce "must carry its fair share of the state tax burden." Motion, at 4. There would be no need for reference to those decisions if, as Appellee then argues, the sales in question were in fact purely intrastate. Nor would there by any need to accuse Shell of "shad[y]," "cunning" activities. *See* Motion, at 6; note 5,

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and transportation sales taxes is constitutionally permissible, the inquiry must focus on the "actuality of operation" of the tax system: "a proper analysis must take 'the whole scheme of taxation into account.'" *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69 (1963). Yet the unarticulated rationale underlying the decision below is simply that Shell must be made to bear some local tax burden notwithstanding the fact that if Shell had a place of business in Missouri, outside of St. Louis County, these taxes would not be due.

supra. By their mere presence, those references acknowledge the interstate character of Shell's sales.

CONCLUSION

The questions presented in this appeal are substantial.[7] The absence of any attempt by Appellee to address any of the several issues raised underscores the validity of Shell's appeal. No place does Appellee explain *why* he believes that this appeal presents no substantial federal question. This Court has jurisdiction, and Appellee's Motion to Dismiss for want of a substantial federal question therefore should be overruled. The decision of the Supreme Court of Missouri was incorrect, and Appellee's alternative Motion to Affirm should likewise be overruled. This Court should note probable jurisdiction of this appeal and should docket the case for briefing and oral argument.

Respectfully submitted,

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[7] In view of the holding of the Supreme Court of Missouri that Shell has a nexus to St. Louis County through its "agents," which could be none other than the companies responsible solely for *delivery* of the fuel, *see* Juris. Statement, at 10, 12-15, this case may present questions analogous to those in *D.H. Holmes Co.* v. *McNamara*, No. 87-267, in which this Court recently noted probable jurisdiction of the taxpayer's appeal.